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Attorneys for Defendants GENERAL MILLS, INC.
and GENERAL MILLS SALES, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

TROY BACKUS, on behalf of himself and
all others similarly situated,

Plaintiff,

v.

GENERAL MILLS, INC. and GENERAL
MILLS SALES, INC.,

Defendants.

Case No. 15-cv-01964 TEH

STATEMENT OF RECENT DECISION

1 Pursuant to Local Rule 7-3(d)(2), Defendants submit the following recent decision in
2 support of their pending motion to dismiss under Rule 12(b)(6): *Guttmann v. Nissin Foods*
3 (*U.S.A.) Company, Inc.*, No. 15-cv-00567-WHA (N.D. Cal. Aug. 14, 2015) (Dkt. 59).

4 DATED: August 16, 2015

Respectfully,

5 **PERKINS COIE LLP**

6
7 By: /s/ Joshua A. Reiten

JOSHUA A. REITEN

8 Attorneys for Defendants GENERAL MILLS, INC.
9 and GENERAL MILLS SALES, INC.
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6 IN THE UNITED STATES DISTRICT COURT
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8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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10 VICTOR GUTTMANN, on behalf of
11 himself and all others similarly situated,

12 Plaintiff,

13 v.

14 NISSIN FOODS (U.S.A.) COMPANY,
15 INC.,

16 Defendant.
17

No. C 15-00567 WHA

**ORDER GRANTING
DEFENDANT'S MOTION
TO DISMISS**

18 **INTRODUCTION**

19 In this putative class action involving instant noodles, defendant moves to dismiss the
20 complaint pursuant to Rules 12(b)(1) and 12(b)(6). A prior order dismissed several claims
21 pursuant to Rule 12(b)(6). For the reasons stated below, defendant's motion to dismiss is
22 **GRANTED.**

23 **STATEMENT**

24 Our plaintiff, Victor Guttman, seeks to eradicate artificial trans-fat from food and, to
25 that end, has sued five different manufacturers over artificial trans-fat. In this case, Guttman
26 goes after instant noodle products manufactured and sold by defendant Nissin Foods (U.S.A.)
27 Company, Inc. Nissin's noodle products contained partially-hydrogenated oil, a food additive
28 derived from low-cost oils (Amd. Compl. ¶¶ 10–15, 58).

Guttman's complaint cites numerous studies that have linked the consumption of
artificial trans-fat to increased risk of certain medical conditions such as cardiovascular heart

disease, diabetes, breast, prostate, and colorectal cancer, Alzheimer’s disease, and organ damage. In particular, the complaint alleges “[t]here is ‘no safe level’ of artificial trans fat intake” and “any incremental increase in trans fat increases risk of [cardiovascular heart disease]” (*id.* ¶¶ 16–56). The use of partially-hydrogenated oils was not required by law, and while this motion was pending, the Food and Drug Administration issued a final determination that partially-hydrogenated oils are no longer “generally recognized as safe.” 80 Fed. Reg. 34650 (June 17, 2015). Pursuant to that determination, manufacturers must remove partially-hydrogenated oils from their products within three years.

Although all of Nissin’s noodle products contained partially-hydrogenated oils (and listed those oils among the ingredients of those products), the nutrition-facts panel on each of the product labels included the indication “Trans Fat: 0g.” FDA regulations do not (and did not) require trans-fat content to be declared in the nutrition-facts panel on a product label, however, “[i]f the serving contains less than 0.5 gram[s of trans-fat], the content, when declared, shall be expressed as zero.” 21 C.F.R. 101.9(c)(2)(ii).

Guttmann claims that he assumed all of Nissin’s noodle products were safe to consume, and he notes that several products similar to Nissin’s noodles do not contain artificial trans-fat (Amd. Compl. ¶¶ 76-84; Appendix B). He also claims he was economically harmed because he was deprived of the benefit of his bargain, having thought he got safe food when, in fact, he got unsafe food.

Guttmann has been a plaintiff in three prior lawsuits regarding artificial trans-fat and food labeling. *Chacanaca v. The Quaker Oats Company*, No. 10-0502 (N.D. Cal.) (Judge Richard Seeborg); *Eileen Peivani v. Hostess Brands, Inc.*, No 10-02303 (C.D. Cal.) (Judge Consuelo Marshall); *Guttmann v. Ole Mexican Foods, Inc.*, No 14-04845 (N.D. Cal.) (Judge Haywood Gilliam). Since commencing this action he has filed an additional lawsuit, *Guttmann v. La Tapatia Tortilleria, Inc.*, No 15-02042 (Judge Susan Illston).¹

¹ Guttmann argues that his litigation history is not contained within the pleadings, and so cannot be considered in this order. Although allegations of fact in a complaint are accepted as true for the purposes of adjudicating a motion to dismiss, such allegations may be rejected if contradicted by matters properly subject to judicial notice. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). Accordingly,

1 A prior order dismissed Guttman's claims that pertained to product labeling as well as his
2 claim for public nuisance (Dkt. No. 53). Guttman's claims for violation of the unfair prong of
3 the California Unfair Competition Law, California Business & Professions Code Section 17200,
4 *et seq.*, and for breach of the implied warranty of merchantability are the only claims remaining.

5 Nissin moves to dismiss Guttman's complaint for lack of standing and failure to state a
6 claim. Following full briefing and oral argument, the parties were ordered to conduct limited
7 discovery regarding Guttman's alleged increased risk of medical harm and his knowledge that
8 all foods containing partially-hydrogenated oils, including Nissin's noodles, contained artificial
9 trans-fat. Both parties filed supplemental briefs detailing that limited discovery, although
10 Guttman's was untimely.

11 ANALYSIS

12 In his deposition taken in the limited discovery ordered for the purpose of this motion,
13 Guttman admitted facts that were already clear from his pleadings in his prior complaints,
14 namely, that as of 2010 when he commenced his litigation campaign, he was aware that
15 (i) products could be labeled "0g Trans Fat" if they contained less than 0.5 grams of trans-fat,
16 (ii) partially-hydrogenated oils contained artificial trans-fat, (iii) he could check the ingredients
17 labels on food products to see if they contained partially-hydrogenated oils, and (iv) artificial
18 trans-fat was linked to health risks (Guttman Dep. at 40–48). Further, Guttman admitted that
19 he actually *did* inspect some product labels to discern whether they contained dangerous trans-
20 fats (*id.* at 56).

21 It is undisputed that Nissin listed partially-hydrogenated oils among the ingredients on all
22 of its product labels, and judicial notice has already been taken of the contents of the product
23 labels (Dkt. No. 53). Thus, this order finds Guttman was keenly aware of the alleged injury he
24 might suffer by eating Nissin's noodles, and he knew he could have avoided any such injury
25 caused by Nissin by simply checking the product label. This fact is fatal to Guttman's
26 remaining claims.

27 _____
28 Guttman's litigation history is appropriate to consider.

1 **1. UNFAIR PRONG OF SECTION 17200.**

2 An act or practice cannot be unfair within the meaning of Section 17200 if it caused an
3 “injury the [plaintiff] could reasonably have avoided.” *Daugherty v. American Honda Motor*
4 *Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006). As discussed above, since commencing his
5 litigation campaign in 2010, Guttman could reasonably have avoided any injury based on
6 Nissin’s use of artificial trans-fat by reading the nutrition-facts panel and deciding not to
7 purchase or consume them based on the presence of partially-hydrogenated oil. Guttman
8 alleges that he purchased and consumed Nissin’s noodles prior to becoming aware of the alleged
9 dangers of partially-hydrogenated oil and artificial trans-fat in 2010, but any claims based on
10 those purchases are barred by the four-year statute of limitations. Cal. Bus. & Prof. Code
11 § 17208. Thus, Guttman’s claim under the unfair prong of Section 17200 must be **DISMISSED**.

12 **2. IMPLIED WARRANTY OF MERCHANTABILITY.**

13 Guttman also claims that he suffered a financial harm by purchasing Nissin’s noodle
14 products, which he argues were not “fit for the ordinary purposes for which such goods are
15 used,” in breach of the implied warranty of merchantability. Cal. Com. Code § 2314(2)(c);
16 Cal. Civ. Code § 1791.1(a)(2). To breach the implied warranty of merchantability, a product
17 must lack “even the most basic degree of fitness for ordinary use.” *Mocek v. Alfa Leisure, Inc.*,
18 114 Cal. App. 4th 402, 406 (2003). If a buyer “has examined the goods or the sample model as
19 fully as he desired or has refused to examine the goods,” however, “there is no implied warranty
20 with regard to defects which an examination ought in the circumstances to have revealed to
21 him.” Cal. Com. Code § 2316. Accordingly, even if Guttman could claim that Nissin’s
22 noodles were unfit for human consumption due to the presence of artificial trans-fat, Guttman
23 could have easily discovered that defect by reading the ingredients, which undisputedly listed
24 partially-hydrogenated oils.

25 Guttman cites *Reid v. Johnson & Johnson*, 780 F.3d 952, 958-59 (9th Cir. 2015), for
26 the contention that the inclusion of partially-hydrogenated vegetable oil on an ingredient list
27 does not have a “curative effect” for a manufacturer’s conduct that could give rise to liability,
28 because a “typical consumer” would not understand that ingredient includes artificial trans-fat.

1 This order need not determine whether a typical consumer could have a claim for breach of the
2 implied warranty of merchantability because Guttman is not a typical consumer but is a self-
3 appointed inspector general roving the aisles of our supermarkets. He continues on a five-year
4 litigation campaign against artificial trans-fat and partially-hydrogenated oil and has admitted
5 that he has inspected products for those ingredients before. Guttman's apparent refusal to
6 inspect Nissin's noodles for an alleged defect despite his extensive knowledge of and concern
7 for this particular ingredient is fatal to his claim for breach of the implied warranty of
8 merchantability.

9 Guttman's argument that he purchased Nissin's noodles prior to becoming aware of the
10 alleged dangers of partially-hydrogenated oil and artificial trans-fat in 2010 fails on this claim as
11 well, as the statute of limitations for breach of the implied warranty of merchantability is also
12 four years. Cal. Com. Code § 2725.


13 Accordingly, Guttman's claim for breach of the implied warranty of merchantability must
14 be **DISMISSED**.

15 CONCLUSION

16 Nissin's motion to dismiss the remaining claims under Rule 12(b)(6) is **GRANTED**. The
17 sworn evidentiary record developed through limited discovery demonstrates that no amendment
18 to the pleadings can overcome the fact that plaintiff could have avoided any injury caused by
19 defendants' use of artificial trans-fat in its noodles. Thus, leave to amend will be not be allowed
20 due to futility. This case is now ready for the court of appeals.

21
22 **IT IS SO ORDERED.**

23
24 Dated: August 14, 2015.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE